

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

DEBRA L. DUDLEY,

Civil No. 05-6278-AA  
OPINION AND ORDER

Plaintiff,

VS

JO ANNE B. BARNHART,  
Commissioner of Social Security,

Defendant.

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AIKEN, Judge:

Claimant, Debra Dudley, brings this action pursuant to the Social Security Act (the Act), 42 U.S.C. § 405(g), to obtain

judicial review of a final decision of the Commissioner. The Commissioner denied plaintiff's application for Disability Insurance Benefits (DIB) under Title II of the Social Security Act. 42 U.S.C. §§ 401-33. For the reasons set forth below, the Commissioner's decision is reversed and remanded for payment of benefits.

## PROCEDURAL BACKGROUND

Plaintiff protectively filed her application for DIB benefits on January 9, 2002. Tr. 48. She alleged disability due to manic depressive disorder and high cholesterol commencing on April 27, 2001. Tr. 78. Her application was denied initially, tr. 33, and upon reconsideration. Tr. 38. On November 26, 2004, after a hearing, the Administrative Law Judge (ALJ) ruled that plaintiff was not disabled as defined by the Act. Tr. 17-30. The Appeals Council denied plaintiff's request for review, tr. 5, making the ALJ's decision the final agency decision. See 20 C.F.R. §§ 404.981, 422.210. On September 15, 2005, plaintiff filed the complaint at bar.

## STATEMENT OF THE FACTS

Born in 1954, plaintiff was 49 years old at the time of the hearing decision. Tr. 21, 505. Plaintiff had a high school education. Tr. 21, 84. She had past relevant work as a telephone operator, telephone company account manager, housecleaner, temporary clerical worker, waitress, sales clerk, food service worker, and clothing store foreman. Tr. 21, 539-42.

## **STANDARD OF REVIEW**

This court must affirm the Secretary's decision if it is based on proper legal standards and the findings are supported by

1 substantial evidence in the record. Hammock v. Bowen, 879 F.2d  
2 498, 501 (9th Cir. 1989). Substantial evidence is "more than a  
3 mere scintilla. It means such relevant evidence as a reasonable  
4 mind might accept as adequate to support a conclusion."  
5 Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting  
6 Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)).  
7 The court must weigh "both the evidence that supports and  
8 detracts from the Secretary's conclusions." Martinez v. Heckler,  
9 807 F.2d 771, 772 (9th Cir. 1986).

10 The initial burden of proof rests upon the claimant to  
11 establish disability. Howard v. Heckler, 782 F.2d 1484, 1486  
12 (9th Cir. 1986). To meet this burden, plaintiff must demonstrate  
13 an "inability to engage in any substantial gainful activity by  
14 reason of any medically determinable physical or mental  
15 impairment which can be expected . . . to last for a continuous  
16 period of not less than 12 months. . . ." 42 U.S.C.  
17 § 423(d)(1)(A).

18 The Secretary has established a five-step sequential  
19 process for determining whether a person is disabled. Bowen v.  
20 Yuckert, 482 U.S. 137, 140 (1987); 20 C.F.R. §§ 404.1502,  
21 416.920. First the Secretary determines whether a claimant is  
22 engaged in "substantial gainful activity." If so, the claimant  
23 is not disabled. Yuckert, 482 U.S. at 140; 20 C.F.R.  
24 §§ 404.1520(b), 416.920(b).

25 In step two the Secretary determines whether the claimant  
26 has a "medically severe impairment or combination of  
27 impairments." Yuckert, 482 U.S. at 140-41; see 20 C.F.R.  
28 §§ 404.1520(c), 416.920(c). If not, the claimant is not

1                   disabled.

2                   In step three the Secretary determines whether the  
3 impairment meets or equals "one of a number of listed impairments  
4 that the Secretary acknowledges are so severe as to preclude  
5 substantial gainful activity." Id.; see 20 C.F.R.  
6 §§ 404.1520(d), 416.920(d). If so, the claimant is conclusively  
7 presumed disabled; if not, the Secretary proceeds to step four.  
8 Yuckert, 482 U.S. at 141.

9                   In step four the Secretary determines whether the claimant  
10 can still perform "past relevant work." 20 C.F.R.  
11 §§ 404.1520(e), 416.920(e). If the claimant can work, she is not  
12 disabled. If she cannot perform past relevant work, the burden  
13 shifts to the Secretary. In step five, the Secretary must  
14 establish that the claimant can perform other work. Yuckert, 482  
15 U.S. at 141-42; see 20 C.F.R. §§ 404.1520(e) & (f), 416.920(e) &  
16 (f). If the Secretary meets this burden and proves that the  
17 claimant is able to perform other work which exists in the  
18 national economy, she is not disabled. 20 C.F.R. §§ 404.1566,  
19 416.966.

20                   DISCUSSION

21                   The ALJ's Findings

22                   At Step One, the ALJ found that plaintiff had not engaged  
23 in substantial gainful activity since the alleged onset of  
24 disability. Tr. 22, 29, Finding 2. 20 C.F.R. § 404.1520(b).  
25 This finding is not in dispute.

26                   At Step Two, the ALJ found that plaintiff had bipolar  
27 disorder and post-traumatic stress disorder (PTSD), impairments  
28 that were severe under the Regulations. Tr. 22, 29, Finding 3.

1       20 C.F.R. § 404.1520(c). This finding is not in dispute.

2           At Step Three, the ALJ found that plaintiff's impairments  
3 did not meet or equal the requirements of a listed impairment.  
4 Tr. 29, Finding 4. 20 C.F.R. §§ 404.1520(a)(4)(iii),  
5 404.1520(d). This finding is in dispute.

6           Regarding plaintiff's residual functional capacity (RFC),  
7 the ALJ found that plaintiff was capable of performing a wide  
8 range of work at all exertional levels. The ALJ found that  
9 plaintiff retained the RFC as follows: she was mentally able to  
10 understand, remember, and carry out simple and complex  
11 instructions; she was capable of maintaining attendance,  
12 scheduling and concentration and attention to complete a normal  
13 workday without a great deal of interruption from psychologically  
14 based issues; she was capable of interacting with the general  
15 public and coworkers; she did not have any restrictions in  
16 adaptation or the ability to secure employment. She had no  
17 exertional limitations. Tr. 28, 29, Finding 6. 20 C.F.R. §§  
18 404.1520(e), 404.1545, 404.1567. This finding is in dispute.

19           At Step Four, the ALJ found that plaintiff remained capable  
20 of performing her past relevant work as a telephone operator, as  
21 that occupation is generally performed in the national economy.  
22 Tr. 28, 29, Finding 8. The ALJ, therefore, found plaintiff was  
23 not disabled under the Act. This finding is in dispute.

24           Finally, at Step Five, because the ALJ found plaintiff not  
25 disabled at Step Four, the ALJ was not required to address this  
26 step in the sequential evaluation process. The ALJ did, however,  
27 elicit vocational expert (VE) testimony and found, in the  
28 alternative, that plaintiff could perform other work existing in

1 significant numbers in the national economy, and thus, would  
2 still not be disabled under the Medical-Vocational Guidelines.  
3 Tr. 28. 20 C.F.R. §§ 404.1520(a)(4)(v), 404.1520(g). This  
4 finding is in dispute.

5 Plaintiff's Allegations of Error

6 Plaintiff makes the following assertions of error, the ALJ  
7 improperly: (1) found plaintiff's condition did not meet Listing  
8 12.04 for bipolar disorder; (2) rejected the opinion of an  
9 examining psychologist; (3) rejected plaintiff's testimony; and  
10 (4) failed to consider plaintiff's physical impairments in  
11 combination.

12 Plaintiff relies on a psychological evaluation completed by  
13 Barbara Perry, Ph.D., on May 4, 2005, submitted to the Appeals  
14 Council. Tr. 461-67. Dr. Perry also completed a Mental Residual  
15 Functional Capacity Report on May 16, 2005. Tr. 468-69. Dr.  
16 Perry's May 4, 2005, evaluation was titled a "Psychodiagnostic  
17 Evaluation Follow-Up" to assess plaintiff's recent (past three  
18 years) and current psychological functioning. Dr. Perry's  
19 evaluation was based on a clinical interview, the administration  
20 of several mental health "screens," and the "considerable  
21 information" available in plaintiff's file. Tr. 461. Dr. Perry  
22 provided the Appeals Council with a comprehensive assessment of  
23 plaintiff's mental health, concluding with the finding that  
24 plaintiff "appears to be functioning psychologically at a much  
25 lower level than when I first saw her in April 2002." Tr. 466.

26 Dr. Perry assessed plaintiff with the following  
27 psychiatric diagnoses: Bipolar Disorder, Mixed, probably rapid  
28 cycling with psychotic symptoms at times; PTSD, chronic; Panic

14 Dr. Perry also found plaintiff "markedly limited<sup>1</sup>" in the  
15 following areas: ability to understand and remember detailed  
16 instructions; ability to carry out detailed instructions; ability  
17 to perform activities within a schedule, maintain regular  
18 attendance, and be punctual within customary tolerance; ability  
19 to sustain an ordinary routine without special supervision;  
20 ability to work in coordination with or in proximity to others  
21 without being distracted by them; ability to complete a normal  
22 workday and workweek without interruptions from psychologically  
23 based symptoms and to perform at a consistent pace without an  
24 unreasonable number and length of rest periods; ability to get  
25 along with co-workers or peers without distracting them or

<sup>1</sup> "Markedly limited" is defined as a limitation which precludes the ability to perform the designated activity on a regular and sustained basis, i.e., 8 hours a day, 5 days a week, or an equivalent work schedule.

1 exhibiting behavioral extremes; ability to respond appropriately  
2 to changes in the work setting; and ability to travel in  
3 unfamiliar places or use public transportation. Dr. Perry  
4 further found plaintiff "moderately limited<sup>2</sup>" in the following  
5 areas: ability to remember locations and work-like procedures;  
6 ability to maintain attention and concentration for extended  
7 periods; ability to interact appropriately with the general  
8 public; ability to accept instructions and respond appropriately  
9 to criticism from supervisors; ability to be aware of normal  
10 hazards and take appropriate precautions; and ability to set  
11 realistic goals or make plans independently of others. Tr. 468-  
12 69.

13 Further, Dr. Perry indicated that plaintiff's prognosis was  
14 "guarded," and stated that plaintiff was "compliant with  
15 treatment." Tr. 469. Finally, Dr. Perry noted that plaintiff's  
16 condition will last at least twelve months. Id.

17 Contrary to defendant's contention, "it is clear that  
18 reports containing observations made after the period for  
19 disability are relevant to assess the claimant's disability."  
20 Kemp v. Weinberger, 522 F.2d 967, 969 (9<sup>th</sup> Cir. 1975). See also,  
21 Bilby v. Schweiker, 762 F.2d 716, 719 (9<sup>th</sup> Cir. 1985) (medical  
22 reports are inevitably rendered retrospectively and should not be  
23 disregarded solely on that basis). Here, the Appeals Council  
24 considered the additional evidence submitted by the plaintiff and  
25 found that "the information does not provide a basis for changing

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27       <sup>2</sup>"Moderately limited" is defined as a limitation which "seriously  
28 interferes with the individual's ability to perform the  
designated activity on a regular and sustained basis, i.e., 8  
hours a day, 5 days a week, or an equivalent work schedule.

1 the Administrative Law Judge's decision." Tr. 6. The  
2 regulations provide that the "Appeals Council shall evaluate the  
3 entire record, including new relevant evidence, and shall review  
4 the decision of the ALJ if the ALJ's actions, findings, or  
5 conclusions are contrary to the weight of the evidence in the  
6 entire record." 20 C.F.R. § 404.970(b). Further, the Ninth  
7 Circuit has held that it is appropriate to review de novo the  
8 Appeals Council's refusal to review the ALJ's decision where  
9 claimant presents new material to the Appeals Counsel after the  
10 hearing before the ALJ. Bates v. Sullivan, 894 F.2d 1059, 1063-  
11 64 (9<sup>th</sup> Cir. 1990).

12 Here, upon receiving the new evidence from Dr. Perry, the  
13 Appeals Council could have remanded to the ALJ for a further  
14 hearing. It chose not to do so. Instead, the Appeals Council  
15 treated the record as complete. This court may now appropriately  
16 consider both the ALJ's decision and the additional material  
17 submitted to the Appeals Council. Ramirez v. Shalala, 8 F.3d  
18 1449, 1451-52 (9<sup>th</sup> Cir. 1993). In considering Dr. Perry's  
19 evaluations including plaintiff's diagnoses, her current level of  
20 adaptive functioning, and plaintiff's residual function  
21 capacities, this court may either remand the case for additional  
22 evidence or award benefits. Varney v. Secretary of Health and  
23 Human Servs., 859 F.2d 1396, 1399 (9<sup>th</sup> Cir. 1988) (internal  
24 quotation omitted). Where the record is complete, the court may  
25 award benefits to the plaintiff. Id. (internal citation  
26 omitted). Here, the record establishes that plaintiff has at  
27 least the diagnoses of Bipolar Disorder (with psychotic symptoms  
28 at times); PTSD, chronic; Panic Disorder; and Obsessive-

1 Compulsive Disorder. The record also establishes that  
2 plaintiff's current level of adaptive functioning ranges between  
3 35 and 45. Finally, the court notes that plaintiff's mental  
4 residual functional capacity is limited. That conclusion is  
5 based on the evaluation of plaintiff's basic mental health skills  
6 which resulted in an overwhelming number of both "moderately" and  
7 "markedly limited" skills necessary to engage in competitive  
8 employment. Moreover, I find no substantial evidence to the  
9 contrary. The Appeals Council therefore erred in failing to  
10 overturn the ALJ's decision and award benefits to plaintiff.  
11 Therefore, the Secretary's decision is reversed and remanded for  
12 payment of benefits.

13 **CONCLUSION**

14 The Commissioner's decision is not based on substantial  
15 evidence, and is therefore, reversed and remanded for payment of  
16 benefits.

17 IT IS SO ORDERED.

18 Dated this 4 day of October 2006.

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Ann Aiken  
Ann Aiken  
United States District Judge